

VERMONT LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA,)
LOCAL 8774, BARRE and CITY OF)
BARRE)

DOCKET NO. 81-45

FINDINGS OF FACT, OPINION, AND ORDER

Statement of the Case

This is a unit determination matter brought by the United Steelworkers of America, Local 8776, Barre ("Union") by letter filed with the Vermont Labor Relations Board on September 15, 1981. The Union seeks to add the position of "Payroll Clerk/Computer Operator and Programmer Trainee Supervisor" to the bargaining unit they represent which consists of non-supervisory and non-confidential employees of the City of Barre who are not included within the Police and Fire units. The City of Barre ("City") contends the position is a confidential position pursuant to 21 VSA §1722.

A hearing was held December 3, 1981, before the full Board at the Board hearing room in Montpelier. Albert Grant, Union Staff Representative, represented the Union. The City was represented by its attorney, John Nicholls. At the hearing the Board determined it would take the letter filed by the Union on September 15, 1981, as a formal petition to add the position in dispute to the bargaining unit. The parties waived the filing of briefs.

FINDINGS OF FACT

1. The City is a municipal employer as that term is defined in 21 VSA §1722(13).

2. On July 14, 1978, the Barre City Office and Custodial Employees Union was certified as the collective bargaining representative of all non-supervisory City employees. On October 17, 1978, the Barre City Office and Custodial Employees Union affiliated with Local 8776 of the United Steelworkers of America. At the time of original certification, the position of Payroll Clerk/Computer Operator was included within the bargaining unit.

3. Soon thereafter, the occupant of the Payroll Clerk/Computer Operator position, Patsy Quimby, was moved from the Water Department office to the City Manager's office. During initial negotiations between the City and the Union, it was agreed the position of Payroll Clerk/Computer Operator would be excluded from the bargaining unit.

4. Patsy Quimby subsequently left the position and was replaced by Holly Haggerty.

5. On March 14, 1981, Carol Gray was hired as "Payroll Clerk/Computer Operator and Programmer Trainee Supervisor" to replace Holly Haggerty.

6. Gray works in the City Manager's office. The City Manager's office houses four employees and is divided into three separate rooms which adjoin each other:

- a) City Manager Paul Hermann's office;
- b) an outer office where Carol Gray and Rachel Messier, secretary to the City Manager, have their desks; and
- c) a room where the computer terminal is located, and where the Assistant Payroll Clerk has her desk.

7. Gray's desk is approximately six feet from both the desk of Rachel Messier and the door to Paul Hermann's office.

8. Rachel Messier is excluded from the bargaining unit as a confidential employee.

9. The duties and responsibilities of the Payroll Clerk/Computer Operator are as described in the job description in evidence as Employer's Exhibit A.

10. The personnel files of all City employees are located in the outer office. Only three people have unlimited access to these files: Hermann, Gray, and Messier.

11. In the regular course of her employment, Gray uses the personnel files to gather data on pay rates and perform research work for the City Manager in preparation of material relating to warnings, reprimands, and other disciplinary matters. In doing the research work on disciplinary matters, Gray gathers anything in the file relative to the matter (i.e. sick leave use, past warnings), presents it to Mr. Hermann in statistical form, and then discusses it with him.

12. Gray has not prepared or typed any drafts of disciplinary letters. The City Manager writes the drafts and the typing is done by Rachel Messier.

13. When a disciplinary letter is sent to an employee by Herman, Gray receives a copy.

14. In the course of contract negotiations with the four unions representing City employees, Hermann has asked Gray to calculate the estimated costs to the City of proposed salary increases. Gray has so calculated. Also, Gray has overheard conversations in the City Manager's office relating to ongoing contract negotiations.

15. Gray has been responsible for performing research work on disciplinary matters and doing cost estimates of contract proposals since she was hired and has been given no additional duties of a confidential nature since the present dispute arose.

16. Rachel Messier takes dictation, types, answers the telephone, and is responsible for the upkeep of personnel files in the normal course of her duties. Given her present workload, she would be unable to additionally perform the research work on disciplinary matters and do cost estimates of contract proposals that Carol Gray presently does.

17. Gray substitutes for Messier when the latter is sick or on vacation, a period of approximately three weeks a year. In so substituting, Gray has not taken dictation from Hermann or done any typing on labor relations matters. There is no claim by the City that Gray should be considered a confidential employee due, in whole or in part, to her work as a substitute.

18. The volume of work in the City Manager's office relating to contract negotiations, grievance handling, and personnel administration has increased over time.

19. There has been no discussion among Gray, Messier, and Hermann relative to keeping Gray out of the bargaining unit.

20. The City is continually programming more types of data into the computer.

OPINION

At issue here is whether Carol Gray is a confidential employee and, thus, excluded from eligibility to belong to the bargaining unit under 21 VSA §1722(12)(D). The term confidential employee is defined in 21 VSA §1722(6) as:

an employee whose responsibility or knowledge or access to information relating to collective bargaining, personnel administration, or budgetary matters would make membership in or representation by an employee organization incompatible with his official duties.

In passing, we note the US Supreme Court has recently construed Federal law on confidential employees to coincide with the above language as passed by the Vermont General Assembly. NLRB v. Hendricks County Rural Electric Membership Corporation, Nos. 80-885 & 80-1103; December 2, 1981.

In previous cases interpreting this language, we have ruled that employees who have access to confidential information as part of their regular duties meet this definition, American Federation of Teachers, Local 3333 and Washington Central Supervisory Union, 1 VLRB 288 (1978); Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978); but that employees whose duties require only occasional access to confidential material which the employer could reassign or employees who occasionally substitute for confidential employees do not meet the definition of "confidential" employee. Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979).

In the case before us, Gray in the regular course of her employment has unlimited access to employees' personnel files and uses the files to perform research work for the City Manager in the preparation of material relating to warnings, reprimands and other disciplinary matters. She also calculates the estimated costs of proposed salary increases during contract negotiations. The location of her desk further means that she may overhear discussions from the City Manager's office of a confidential nature relating to collective bargaining. Given her job duties and location, Gray obtains advance information of the City's position with regard to contract negotiations and the disposition of grievances.

These duties of Gray make her inclusion in the bargaining unit and potential membership in the Union incompatible with her official duties. As we stated in American Federation of Teachers, supra at 293:

Vermont's municipal labor relations statute, therefore, adheres to the rationale generally accepted in labor law that an employer should be entitled to rely upon employees who are not subject to divided loyalties and that employees should not be put in a position where they must choose between their obligations to a union and to their employer.

Given the nature of her duties and the physical setup of the City Manager's office, it is evident Gray's interests and loyalties are more closely aligned with management than with bargaining unit members.

Nonetheless, the Union contends the City Manager could reassign Gray's confidential duties to Rachel Messier and move her desk to the adjoining room where the computer terminal is located so she would no longer be within earshot of the City Manager's discussions on confidential matters. If we found Gray's work of a confidential nature was occasional and intermittent, assigned to her on a pretextual basis to keep her out of the bargaining unit, and could feasibly be reassigned, we would place her in the unit. However, after careful review of the evidence, we conclude these work assignments are not pretextual and cannot be feasibly reassigned. They cannot feasibly be reassigned to Rachel Messier since Messier is unable to handle the increased workload. The volume of labor relations work of a confidential nature in the City Manager's office necessitates such work being assigned to both the secretary to the City Manager and the Payroll Clerk/Computer Operator. Further, the City is continually placing more data on the computer, and it is evident the person holding Gray's position will be an ever-increasing source of material for the City Manager.

If Gray's knowledge of or access to confidential matters was limited solely to overhearing conversations in the City Manager's office, we do not believe it would be an unfair burden on management to move her desk to the adjoining room, and we would place her in the unit. However, the moving of Carol Gray's desk to the room where the computer terminal is located would serve no purpose, since, as indicated above, she still would be performing confidential duties.

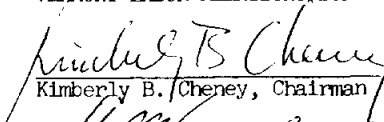
We must conclude Gray meets the statutory definition of confidential employee and, thus, is ineligible to belong to the bargaining unit.

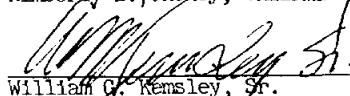
ORDER


Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ordered that the petition of United Steelworkers, Local 8776, Barre, to add the position of Payroll Clerk/Computer Operator and Programmer Trainee Supervisor, now held by Carol Gray, to the bargaining unit of non-confidential and non-supervisory employees they represent is DISMISSED since Carol Gray is a confidential employee under 21 VSA §1722.

Dated this 14th day of January, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.


James S. Gilson